

**IN THE MISSOURI SUPREME COURT**

---

IN RE:

NOEL F. BISGES

Respondent.

---

)  
)  
)  
)  
)  
)  
)

Supreme Court #SC95332

---

**BRIEF OF RESPONDENT**

---

Matthew G. Koehler, #48760  
Brown & James, P.C.  
800 Market Street, Suite 1100  
St. Louis, Missouri 63101  
(314) 421-3400  
Fax: (314) 421-3128  
mkoehler@bjpc.com

*Attorneys for Respondent Noel F. Bisges*

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	3
STATEMENT OF FACTS	4
INTRODUCTION	4
RESPONDENT’S IMPROPER E-MAIL	4
THE FORMER CLIENT’S OWNERSHIP OF HORSES	5
DISCLOSURE OF THE IMPROPER E-MAIL	6
SUPPORT FOR RESPONDENT’S CHARACTER	7
POINT RELIED ON	8
<p>I.     The Supreme Court Should Reprimand Respondent By Imposing Reciprocal Discipline Of Public Censure For Respondent’s Violation Of Rule 4-8.4(c) By Counseling A Client In An E-Mail To Omit A Payment Made To Her Mother From Her Initial Bankruptcy Filings Because Mitigation Supports Such Discipline Based Upon Respondent’s Prompt Payment Of Sanctions Issued By The Bankruptcy Court, Respondent’s Improper Statement Was Not Based Upon Dishonest Or Evil Motives, Respondent Has Shown Remorse, The Improper Statement Was Made In The</p>	

**Page**

E-Mail After Providing The Client With The Appropriate Advice, The Improper E-Mail Was Discovered Through Respondent's Truthful Response To The Bankruptcy Court's Discovery Process, Respondent's Practices That Were Shown Through His Representation Of His Client Reflected A Practice Of Honesty, And Respondent's Good Character Is Reflected By Colleagues Willingness To Confer With Respondent For His Opinions.

ARGUMENT	9
CERTIFICATE OF SERVICE	18
CERTIFICATION: RULE 84.06(C)	19

## TABLE OF AUTHORITIES

<b><u>CASES:</u></b>	<b>Page</b>
<i>In re Krigel</i> , 480 S.W.3d 294 (Mo. banc. 2016)	16
 <b><u>OTHER AUTHORITIES:</u></b>	
American Bar Association,	
<i>Standards for Imposing Lawyer Sanctions</i>	<i>passim</i>
 <b><u>RULES:</u></b>	
Rule 4-8.4(c)	10

## STATEMENT OF FACTS

### Introduction

Respondent begins by agreeing that Informant has accurately recited or referenced orders and judgments issued by courts in the underlying *In re Clink* matter.

### Respondent's Improper E-mail

Informant's Statement of Facts addressed Respondent's improper e-mail message to his former client.

Prior to the improper message, Respondent's e-mail to his former client began with questions between Respondent and the former client regarding information that she provided to complete her initial bankruptcy paperwork. (Respondent's Exhibit A at Appendix A 4 ("Can I fax to you? . . . If just a check written from the business check book will work I can get you one today."), & Appendix A 3 ("We are short staffed this week with Stacie being out, so Friday will be ok with the paystub, if you have name & address of employer, that would help,[sic]")). The e-mail dialogue continued the next day, July 7, 2010, with Respondent asking numerous questions about a loan and property that the former client owned. (*Id.* at Appendix A 2-3 ("First, . . . recognize that don't [sic] have a clue as to who the \$6,688.72 loan is to, and on down the list, [sic] appreciate a little help with this, [sic] should I assume Conservation Credit Union.[sic] . . . . Need 2010 Tax return. . . . 2009 if available. Net income from Tuckers in 2010, 2009? Had any income in last six calendar months? Got rid of tractor, horse trailer, just have blazer?")).

The dialogue between Respondent and his former client caused her to write:

“I had to pay Central Bank \$5,000 to take the liens off my home. I ‘borrowed’ that money from my mom so I made a check out for \$3,000 to her to pay her back. I only have \$100 something in the bank. That should work shouldn’t it. [sic] I just got my tax refund about a week ago.”

(Respondent’s Exhibit A at Appendix A 2). Respondent replied to his former’s client’s statement and question by properly advising against the payment because it would likely cause the Chapter 7 Trustee to file a preference claim against the former’s client’s mother. (*Id.*)

### **The Former Client’s Ownership Of Horses**

Informant’s Statement of Facts noted a factual dispute in the *In re Clink* matter between Respondent and the U.S. Trustee regarding a fax sent from the former client to Respondent. (Informant’s Brief at 5) There were two different versions of the fax with the former client’s version including the word “animals?,” which was alleged to have meant horses. (Informant’s Exhibit A at 7)

Respondent was unable to attend the former client’s Chapter 341 hearing at which the Chapter 7 Trustee will question a debtor about information disclosed on the debtor’s bankruptcy pleading and schedules. Respondent asked a colleague, Mr. Richard Beaver, to represent the former client at the Chapter 341 hearing due to his unavailability. Mr. Beaver testified, under oath, during the underlying *In re Clink* matter that he asked Respondent’s former client before her Chapter 341 hearing began whether she still owned any animals. (Respondent Exhibit D at Appendix A 12 (166:1 - :6), & Appendix A 6

(167:3 - :20). Mr. Beaver testified Respondent's former client told him (Mr. Beaver) that she did not own any animals. (*Id.*)

### **Disclosure Of The Improper E-Mail**

Informant's arguments noted that Respondent's former client became involved in a dispute with her ex-husband, who, at the time, was represented by Respondent in the ex-husband's separate bankruptcy matter. (Informant's Brief at 13) By the time of the dispute, Respondent's representation of the former client had ceased as her bankruptcy case had been closed. The dispute between the former client and her ex-husband created a conflict of interest, which prompted Respondent to withdraw from representing the ex-husband to the conclusion of his bankruptcy case. (Informant's Exhibit A at 12)

Respondent was accused in the *In re Clink* matter of violating Supreme Court Rules by having a conflict of interest when he first represented the ex-husband. (*Id.* at 11-12)

However, the Bankruptcy Court held the conflict did not arise until the dispute occurred between the former client and her ex-husband. (*Id.* at 12) Respondent's withdrawal was held to be appropriate and timely. (*Id.*)

The dispute between the former client and ex-husband caused both parties to accuse each other of not disclosing assets in their respective bankruptcy cases. (Respondent's Response at 9) The improper e-mail message to Respondent's former client was discovered during this dispute. The U.S. Trustee requested Respondent's entire file from his representation of his former client. (*Id.* at 12) Respondent turned over the entire file, which included the improper e-mail. (*Id.*) It was through that production that the U.S. Trustee learned of the improper e-mail.

### **Support For Respondent's Character**

Mr. Richard Beaver has provided a letter in support of Respondent's character and abilities, which is attached as Exhibit H. Mr. Beaver writes:

“Throughout the years, I have found Mr. Bisges has always been up to date on the latest issues, and a valuable asset and sounding board for his fellow practitioners, including me, on the latest issues affecting our particular area of practice; and, has always been willing to share his findings on those issues. I believe Mr. Bisges is a hard working attorney, that is fully capable of representing his Clients in [sic] a knowledgeable, capable, and zealous manner. And, I believe Mr. Bisges deserves our support and understanding in the matters at hand.”

(Respondent's Exhibit H at Appendix A 14)

## POINT RELIED UPON

- I. The Supreme Court Should Reprimand Respondent By Imposing Reciprocal Discipline Of Public Censure For Respondent's Violation Of Rule 4-8.4(c) By Counseling A Client In An E-Mail To Omit A Payment Made To Her Mother From Her Initial Bankruptcy Filings Because Mitigation Supports Such Discipline Based Upon Respondent's Prompt Payment Of Sanctions Issued By The Bankruptcy Court, Respondent's Improper Statement Was Not Based Upon Dishonest Or Evil Motives, Respondent Has Shown Remorse, The Improper Statement Was Made In The E-Mail After Providing The Client With The Appropriate Advice, The Improper E-Mail Was Discovered Through Respondent's Truthful Response To The Bankruptcy Court's Discovery Process, Respondent's Practices That Were Shown Through His Representation Of His Client Reflected A Practice Of Honesty, And Respondent's Good Character Is Reflected By Colleagues Willingness To Confer With Respondent For His Opinions.

In re Krigel, 480 S.W.3d 294 (Mo. banc. 2016)

## ARGUMENT

- I. The Supreme Court Should Reprimand Respondent By Imposing Reciprocal Discipline Of Public Censure For Respondent's Violation Of Rule 4-8.4(c) By Counseling A Client In An E-Mail To Omit A Payment Made To Her Mother From Her Initial Bankruptcy Filings Because Mitigation Supports Such Discipline Based Upon Respondent's Prompt Payment Of Sanctions Issued By The Bankruptcy Court, Respondent's Improper Statement Was Not Based Upon Dishonest Or Evil Motives, Respondent Has Shown Remorse, The Improper Statement Was Made In The E-Mail After Providing The Client With The Appropriate Advice, The Improper E-Mail Was Discovered Through Respondent's Truthful Response To The Bankruptcy Court's Discovery Process, Respondent's Practices That Were Shown Through His Representation Of His Client Reflected A Practice Of Honesty, And Respondent's Good Character Is Reflected By Colleagues Willingness To Confer With Respondent For His Opinions.**

In this matter, Respondent was publicly censured by the United States District Court for the Western District of Missouri (hereafter, the "District Court") for sending an

e-mail message to a former client (while Respondent represented the client) that included an improper statement of “make sure it cannot be traced. [sic] & [sic] stick with the story, it did not happen.”

Informant has recommended a discipline of reprimand for Respondent’s violation of Rule 4-8.4(c). (Informant’s Brief at 10 (Point Relied Upon), & 13)

Respondent admitted to the Bankruptcy Court that his statement in the e-mail was improper and should not have been sent. (Informant’s Exhibit A at 5) Respondent has continued to apologize for the improper e-mail, including an apology to the District Court and this Court. (Informant’s Brief at 14)

In addition to acknowledging the e-mail was improper and expressing remorse, Respondent has agreed with Informant’s recommended discipline of reprimand. (Respondent’s Response at 17-18)

Informant correctly notes that aggravating and mitigating factors set forth in the American Bar Association’s *Standards for Imposing Lawyer Sanctions* (1991 Ed.) (hereafter, the “*ABA Standards*”) should be considered. (Informant’s Brief at 14)

Informant argued that multiple instances of misconduct were present, referencing the finding that Respondent failed to disclose his former client’s horses and filed amended pleadings without her signature. (Informant’s Brief at 14) Informant continued that such findings were “multiple offenses” and merited consideration as an aggravating circumstance. (*Id.*)

Respondent respectfully disagrees with Informant's conclusion about multiple offenses. The District Court's discipline panel recommended discipline of Respondent only for the improper e-mail.

Informant also observed that Respondent had two prior "remote" offenses, which is considered an aggravating circumstance. (Informant's Brief at 14) *See ABA Standards*, § 9.22(a)(i). However, Informant acknowledged the offenses were remote, and so those offenses also warrant consideration in mitigation. *ABA Standards*, § 9.32(m).

In further mitigation, Informant noted that Respondent was fined \$4,233 and forced to disgorge the \$1,411 fee he had received from his former client. (Informant's Brief at 6) Respondent promptly paid the fines imposed by the Bankruptcy Court before his appeal of the Bankruptcy Court's order to the District Court. *See ABA Standards*, at § 9.32(d) ("timely good faith effort to make restitution or to rectify consequences of misconduct;").

Informant argued mitigation of the absence of an evil motive should not carry much weight because the other part of *ABA Standard* § 9.32(b) concerns the absence of a dishonest motive. (Informant's Brief at 14). Informant argued that Respondent's improper message was dishonest, and so canceled the lack of an evil motive. (*Id.*)

Informant's argument implied that Respondent's improper message to his former client was caused by a dishonest motive. Respondent testified his improper comment was made out of frustration. (Informant's Exhibit A at 5) Respondent also testified the former client's use of quotation marks around the word "borrowed" made him uncertain

whether the transaction was actually a loan, and whether the former client had already made the payment or was contemplating making a payment. (Informant's Exhibit A at 5-6) Although the Bankruptcy Court found the Debtor considered the transaction to be a loan and the payment to already have occurred, the facts indicate Respondent was not in a position to receive any gain of any nature with regard to a payment from the former client to her mother or the disclosure or non-disclosure of such a payment. His message was improper, but there was no factual finding by the Bankruptcy Court regarding a motive. (Informant's Exhibit A at 5-6)

Informant also observed in mitigation that Respondent has shown remorse through sincere apologies to the District Court and this Court. (Informant's Brief at 14) *See ABA Standard*, § 9.32(1). However, Informant implied criticism of Respondent's former client might "diminish" the importance of his remorse. (*Id.*)

Respondent has never treated the improper e-mail in any manner other than acknowledging that it was wrong and offering his sincere apology. As noted by Informant, the *In re Clink* matter concerned a number of other allegations by the U.S. Trustee, including the failure to disclose horses, purportedly having a conflict of interest (Informant's Exhibit A at 10), improperly asking another attorney to assist his former client at her Chapter 341 hearing (*id.* at 12), and failing to disclose to the Bankruptcy Court that substitute counsel would assist the former client at her Chapter 341 hearing (*id.* at 13). The Bankruptcy Court held in Respondent's favor on several of these claims (conflict of interest, improperly asking another attorney to assist, and failing to disclose the assistance by the other attorney). (Informant's Exhibit A at 12, 13, & 14)

The factual record before the Bankruptcy Court reflected disputes of fact regarding the former client's disclosure of her ownership of horses, which included two different versions of a fax document. (Informant's Exhibit A at 7) On this topic Respondent offered the testimony of the attorney that assisted the former client at her Chapter 341 hearing, which testimony indicated that he asked the former client if she still owned any animals and she responded that she did not. (Respondent's Exhibit D at Appendix A 3-6) Unfortunately, the Bankruptcy Court's order did not mention the testimony from the other attorney. Respondent respectfully suggests what Informant considers criticism of Respondent's former client involved disputes about contradicting evidence. For this reason, Respondent asks the Court to consider his remorse as mitigation without any diminished treatment.

Respondent requests the Court consider in mitigation that his improper e-mail message to his former client began with providing *proper* advice to not make a payment to the mother because the Chapter 7 Trustee would likely pursue a preference claim against her. (Respondent's Exhibit A at Appendix A 2 ("They get ugly. . . .")) Respondent made his wrongful comment after the former client challenged his advice. (*Id.* at Appendix A 1-2) Providing the proper advice suggests that Respondent did not possess a dishonest motive or selfish motive, *see ABA Standards*, § 9.32(b), and his character reflected an intent of honesty, *id.* at § 9.32(g).

Respondent also requests the Court consider in mitigation that he was the one who produced the improper e-mail to the U.S. Trustee. Respondent asks the Court to consider the weight of this mitigation fact to be great. The U.S. Trustee requested Respondent's

file for his former client after the dispute arose between the former client and her ex-husband. Respondent complied with the request and produced his entire file, which included the improper e-mail. Respondent's former client did not produce the e-mail to the U.S. Trustee. Producing the improper e-mail, in response to a request for Respondent's entire file, *strongly* suggests Respondent has good character. *See ABA Standard*, § 9.32(g). Arguably Respondent would not have produced the improper e-mail to the U.S. Trustee if his character was poor and he acted dishonestly with clients, opposing parties, courts, or the public.

Respondent also requests the Court consider in mitigation that evidence reflects a practice of Respondent trying to thoroughly investigate his client's financial situations for purposes of successfully and appropriately prosecuting their respective bankruptcy cases. By way of example, Respondent's office utilized a detailed sheet to inquire about a person's assets and debts (Respondent's Exhibit B at Appendix A 5-7), and communicated with his former client to investigate and understand the assets that she owned as her bankruptcy filing neared (Respondent's Exhibit A at Appendix A 2-3 ("Here's more of list [sic] of things we need to rolling [sic]."). Again, Respondent suggests this evidence is an example of his good character. *See ABA Standard*, § 9.32(g). Had Respondent's character been poor, and his practice based upon dishonesty to the Bankruptcy Court, then arguably such inquiries would have never been conducted. Instead, these records from Respondent's file reflect an attorney trying to thoroughly account for his client's assets and debts for future reporting in bankruptcy pleadings.

Finally, Respondent request the Court consider in mitigation a letter from Mr. Richard Beaver, which is attached as Exhibit H. Mr. Beaver states to this Court that he has always found Respondent to be knowledgeable about current topics in the law and a person that he and others confer with on those topics. (Respondent's Exhibit H at Appendix A 14) Mr. Beaver stated he believes Respondent is fully capable of representing his clients in a knowledgeable, capable, and zealous manner. (*Id.*)

Respondent asks the Court to consider what Mr. Beaver's support means. If Respondent's character was not good, and his reputation among fellow colleagues not good, then Mr. Beaver would not be able to inform this Court that Respondent has been a sounding board for colleagues and shared his findings and opinions with those men and women. A lawyer that does not have a reputation of good character will not be a sounding board for any colleague. Rather, the colleagues will seek out another trusted attorney for his or her opinions, or will further investigate the topics on his or her own.

It is simple for an attorney to write that he finds another colleague to have good character. What Mr. Beaver has provided to this Court is much better than that type of simple statement. Mr. Beaver has provided the Court with an explanation of how he (Mr. Beaver) has found Respondent's colleagues interact with Respondent on professional matters. Mr. Beaver stated that he and others discuss current topics with Respondent to learn about his opinions on those topics. Again, those types of discussions would not occur if Respondent did not possess good character. For this reason, Respondent suggests Mr. Beaver's statement and information be accepted as additional evidence of

Respondent's good character that qualifies for mitigation consideration. *See ABA Standard*, § 9.32(g).

Informant's Brief discussed several Missouri cases. As the Court is aware, each case is judged on its own fact pattern. Respondent suggests to the Court that the cases are substantially different than the pending matter and Respondent's e-mail. Respondent produced the e-mail to the U.S. Trustee in response to a discovery request for his entire file. The context of this request was a dispute over disclosure of ownership of horses. The U.S. Trustee did not receive the e-mail from any other source. It was Respondent's honest conduct that led to the discovery of the e-mail and discipline before the Bankruptcy Court, the District Court, and now this Court. Thus, unlike the cited cases, Respondent exhibited honesty by producing the e-mail to the U.S. Trustee in response to her request.

As noted by Informant, Respondent's conduct falls within Standard 5.13. (Informant's Brief at 15 (citing *ABA Standard*, § 5.13)) For this reason, Respondent requests the Court issue a public reprimand, which is similar to the punishment from the District Court. In the alternative, Respondent requests the execution for any greater punishment be stayed subject to a successful completion of a period of probation. *See In re Krigel*, 480 S.W.3d 294, 302 (Mo. banc. 2016).

Dated this 25<sup>th</sup> day of April, 2016.

Respectfully submitted,

BROWN & JAMES, P.C.

A handwritten signature in black ink, reading "Matt Koehler", written over a horizontal line.

Matthew G. Koehler, #48760

800 Market Street, Suite 1100

St. Louis, Missouri 63101

(314) 421-3400

Fax: (314) 421-3128

mkoehler@bjpc.com

*Attorneys for Respondent Noel F. Bisges*

**CERTIFICATE OF COMPLIANCE**

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:


1. The Respondent's Brief includes information required by Rule 55.03;
2. The Respondent's Brief complies with the limitations contained in Rule 84.06;
3. The Respondent's Brief, excluding cover page, signature blocks, certificate of compliance, and certificate of service contains 3,235 words, as determined by the word-count tool contained in the Microsoft Word 2000 software with which this Respondent's Brief was prepared; and

  
Matthew G. Koehler #48760

**CERTIFICATE OF SERVICE  
AND CERTIFICATE OF COMPLIANCE WITH RULE 55.03(a)**

The undersigned hereby certifies that a copy of the foregoing pleading was served by the Court's electronic filing system on this 25th day of April, 2016, on all counsel of record, including the counsel listed below. In addition, the undersigned counsel certifies under Rule 55.03(a) of the Missouri Rules of Civil Procedure that he has signed the original of this Certificate and the foregoing pleading.

Mr. Alan D. Pratzel, Esq.  
Ms. Sharon K. Weedin, Esq.  
Chief Disciplinary Counsel  
3327 American Ave.  
Jefferson City, Missouri 65109  
*Attorneys for Informant Chief Disciplinary Counsel*

  
Matthew G. Kochler #48760